

G. M. Mechanical, Incorporated and Sheet Metal Workers' International Association, Local 33, AFL-CIO. Cases 8-CA-28494 and 8-CA-28689 (formerly 9-CA-34163)

August 11, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On February 5, 1998, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief and a motion to strike portions of the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions and to adopt the recommended Order.

¹ The General Counsel moves to strike from the Respondent's exceptions and brief any statements of fact and arguments based on statements allegedly made in an affidavit by Supervisor Doug Neuman. Neuman was a key participant in the Respondent's termination of employees David Mains and Terry Matthews, which we find unlawful. In attempting to introduce the affidavit, the Respondent's counsel informed the judge that he had spoken with Neuman by telephone before the hearing and that Neuman had said that he could not testify because he was starting a new job on the date of the hearing. The Respondent did not establish that it was unable to procure Neuman's attendance by process or other reasonable means. Accordingly, the judge sustained the General Counsel's objection to the introduction of Neuman's affidavit. We affirm the judge's ruling. Accordingly, we grant the General Counsel's motion to strike from the Respondent's exceptions any statements allegedly made by Neuman in the rejected affidavit and any argument based on such statements.

² In adopting the judge's conclusion that the Respondent unlawfully discharged Mains and Matthews, we find it unnecessary to rely on the inference drawn by the judge from the Respondent's failure to call Neuman as a witness, i.e., the inference that Neuman's testimony would not have supported testimony by the Respondent's witnesses.

Member Fox and Member Brame agree with the judge's finding that Matthews was discharged in violation of Sec. 8(a)(3). They note that the judge found that Matthews and Mains picketed the Respondent's main entrance carrying signs bearing the legend "Sheet Metal Workers Local 33 Protests Against Substandard Wages." He further found that Supervisor Neuman asked why they were picketing and Mains told him they were protesting the independent contractor requirement and low wages. Accordingly, Matthews and Mains linked the resistance to the independent contractor requirement with their concerted union activity of picketing the Respondent's main entrance and the Respondent was aware of that linkage. In these circumstances, the judge properly found that the Respondent's discharge of Matthews violated Sec. 8(a)(3), as well as Sec. 8(a)(1) of the Act.

Member Hurtgen does not pass on the issue whether the discharge of Matthews was violative of Sec. 8(a)(3). In finding this violation, the judge relied on Matthews' testimony that he was told that he was discharged for refusing to sign an independent contractor agreement. However, there is no evidence that such refusal was sponsored or encouraged by the Union. Although there were picket signs containing the name of the Union, the evidence shows that Matthews was fired for refusing to sign the agreement, not for engaging in the picketing. Accordingly, Member Hurtgen is troubled by the judge's finding, adopted by the Board majority, that the discharge violated Sec. 8(a)(3). How-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, G. M. Mechanical, Incorporated, Covington, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Thomas M. Randazzo, Esq., for the General Counsel.

Darryl M. Kates and G. Randall Ayers, Esqs. (Dinsmore & Shohl LLP), of Cincinnati, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Stubenville, Ohio, on May 13, 1997. The charges were filed on September 4 and 5, 1996,¹ and a consolidated complaint was issued on December 20, 1996.

The complaint alleges that Respondent violated (1) Section 8(a)(1) of the National Labor Relations Act by coercively informing an employee that he had been discharged for engaging in protected union activity and (2) Section 8(a)(3) and (1) by discharging three employees for engaging in such activity.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation with an office in Covington, Ohio, is a commercial contractor in the construction industry at jobsites throughout various States, including Ohio. During the past 12 months it performed services valued in excess of \$50,000 in States other than Ohio. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Discharge of Mains and Matthews

In early July David Mains, a member of the Union with 5 years' experience as a sheet metal worker, asked Respondent's president (Gerald Miller) for a job, without identifying himself as a union member. The latter told him to report to Foreman

ever, he agrees that the refusal to sign the independent contractor agreement was linked to concerted activity of other employees, and that such refusal was protected by Sec. 7. Accordingly, Member Hurtgen would find that the discharge violated Sec. 8(a)(1), and he would not pass on the 8(a)(3) allegation.

The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

¹ All dates are in 1996 unless otherwise indicated.

Doug Blimker with his “resume” at a construction (Plaza) site in Clareshville, Ohio. He did so on the next day and Blimker, after looking at the resume, inquired whether Mains would cross an IBEW picket line in place at the site. When Mains said, “Yes,” Blimker said he would send the resume to Miller.

Miller called Mains on July 18, and told him he was hired at \$9 an hour to do sheet metal work at a “Walmart” site in the Plaza project. He reported on the following day and worked there until the sheet metal work was completed about a month later. Admittedly the work was performed well.

From about July 22 he and other employees had experienced considerable pressure from management to sign an agreement purporting to make them “independent contractors.”² The pressure included threats to withhold paychecks, and in at least one case a fellow worker (Rodney Ackles) went 3 weeks without receiving a check. Mains avoided signing and explained to other employees (including laborer Terry Matthews³) that under the agreement they would not be compensated for job-related injuries or be eligible for unemployment benefits.

Anticipating that he might be laid off when the sheet metal work was done, Mains called President Miller and inquired about the matter. Miller asked if he had any plumbing experience. When Mains said “None,” Miller (who was being pressed to complete extensive plumbing work at the site) offered him a job as a plumbers’ aide (laborer).

Mains accepted and, on August 21, he reported to Plumbing Foreman Doug Neuman, and was assigned to assist plumbers working on the “Lowes” building.

Mains worked as a laborer for 2 days, always under the direction of Neuman and other experienced plumbers.

On Friday, August 23, Mains and Matthews arrived at the site at 6 a.m., an hour before their scheduled start time. They carried signs bearing the legend, “Sheet Metal Workers Local 33 Protests Against Substandard Wages” and proceeded to picket at the main entrance. While they did so many other employees, including foremen, saw them as they drove into the site.

Mains and Matthews ended their demonstration at 6:50 a.m. and reported to Neuman at their scheduled start time of 7 a.m. He asked why they had picketed. Mains told him they were protesting the independent contractor requirement and low wages. The conversation ended at that point and he assigned them to work together moving pipe in an area apart from other employees. They completed that task at about 9 a.m., whereupon Neuman again assigned them to work together, this time laying a gas pipeline on the roof of a building (Staples) under construction. After showing them where the gasline was to run, he departed. They spent the morning gleaning parts and other materials needed for the job from sources located throughout the whole construction site. They worked without supervision and with no other employees present on or in the building; and

no one came to tell them when to go to lunch or when to leave. At 4 p.m. they came down to report completion of the job. Finding no other employees around and the trailer-office locked, they left the site.

When Mains reported to work on the following Monday morning, Foreman Steve Bernard told him he and Matthews were laid off. Mains asked why and Bernard replied, “I cannot tell you why . . . I don’t know.” Mains went to an office trailer where he called President Miller and sought an explanation. Miller told him that he and Matthews had not done enough work on Friday and that he could not justify keeping them. In response to Mains’ protest, Miller asked if he had been on the picket line on Friday. When Mains said, “yes,” Miller replied: “Well that’s dealing with the union and—and we like to have no parts of the union, and this is just one less problem I have to deal with.” With that comment, Miller hung up.

Matthew’s experience on Monday morning was somewhat different. On arriving, he found Supervisor Neuman sitting in a truck. The latter greeted him with the comment: “You guys didn’t get enough work done on Friday,” and then told him he could not go to work unless he signed the independent contractor agreement. Urging him to do so, Neuman added that he would call and urge Miller to put him on “the full steady payroll.” Matthews refused and left.

Mains and Matthews were never recalled from “layoff.”

By virtue of the foregoing facts, most of which are undisputed, I find that the General Counsel has established a prima facie case in support of the allegations in the complaint. The picketing by Mains and Matthews was clearly an action protected under the Act. It was contemporaneously observed by Supervisor Neuman and was immediately followed by his isolating the picketers from other employees—a classic initial reaction of employers harboring antiunion animus. And shortly thereafter both were terminated assertedly with President Miller telling Mains it was for union activism and Supervisor Neuman telling Matthews it was for his resisting imposition of independent contractor status.

Accordingly, it is incumbent on Respondent to present persuasive evidence that the discharges had nothing to do with protected activity or would have occurred in any event.⁴ I am not persuaded.

Two individuals testified on behalf of the Respondent, President Miller and Project Manager William Eicher. Eicher claims Foreman Neuman called him at about 2:30 p.m. on August 23 complaining that Mains and Matthews were paying no attention to his (Neuman’s) directions in laying the roof gasline. Assertedly Eicher instructed Neuman to get rid of them if need be and Neuman replied that “I’m just gonna have to think about it.”

For his part, Miller recounts that he decided on the layoff after receiving a call on Saturday, August 24, wherein Neuman reported that Mains and Matthews had taken too long on and had so messed up the roof pipeline job that it had to be redone. When Mains called on Monday morning, Miller claims to have told Mains he was being laid off due to poor work performance on Friday.⁵ Miller recalls that he was very busy at the time and cut short any further conversation by hanging up.

² As seen from Exhs. R2 through 5, Respondent’s practice was to hire workers ab initio as “independent contractors,” have them submit invoices for time put in at stipulated hourly rates, and pay them the exact total (i.e., rate times hours) with no deductions for social security or other matters. Indeed, there is no indication that Respondent ever asked prospective workers for their social security numbers or tax deductions. Instead, it simply asked for “resumes” listing experience and addresses. Pressure to sign independent contractor agreements occurred after work began. It does not here contest the status of the alleged discriminatees as employees within the meaning of the Act.

³ Matthews began to work for Respondent on July 22 at \$6 an hour.

⁴ *Wright Line*, 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

⁵ At another point in his testimony Miller states that the decision to terminate Mains and Matthews was Neuman’s “call.”

Both Miller and Eicher assert that Neuman did not mention the picketing in his phone calls. They also claim to have learned about the picketing only long after Mains and Matthews were discharged.

I decline to credit Miller and Eicher. Instead, I find probable that either or both were contemporaneously advised of the picketing and had instructed Foreman Neuman to create a pretext for discharge of Mains and Matthews. In this regard, I note that their sudden reassignment was to a substantial job (erecting a gas pipeline) and that they were left alone to do it without supervision. This despite the fact that both were known to have no plumbing experience and had previously been working as laborers under the direction of experienced plumbers, Mains for only 2 days. Further, the unexplained failure to call Neuman as a witness, the one most knowledgeable of why they were so reassigned, warrants an inference that his testimony would not have been supportive of the Miller/Eicher accounts.⁶

In these circumstances, and in view of their apparent candor, I credit (1) Mains' statement that Miller told him he was terminated for supporting the Union and (2) Matthews' undisputed testimony that Foreman Neuman told him he was discharged for refusing to sign the independent contractor agreement.

Accordingly, I find Respondent coercively informed employee Mains that he had been discharged for engaging in protected union activity in violation of Section 8(a)(1) and (2) unlawfully discriminated against employees Mains and Matthews by discharging them for such activity.

B. Discharge of Gombos

Randy Gombos, an organizer for the Union, appeared at the Claesville jobsite on Wednesday, August 28, 2 days after Mains and Matthews were terminated. President Miller was on site and Gombos, without revealing his union affiliation, asked him for a job.

In response to Miller's inquiry Gombos told him he had 7 years' experience as a sheet metal worker. Miller asked if he was available for a job on a Hampton Inn being built in Columbus, Ohio. When Gombos said, "yes," Miller asked for identification data—and wrote it down on a note pad. He told Gombos he would receive \$7 an hour, be given a hotel room in Columbus and receive a \$12 a day food allowance. He then instructed Gombos to report to Project Superintendent Eicher at the site at 7 a.m. on the next day; and he drew on the back of his business card a map indicating where the site was in relation to the Columbus airport and handed it to Gombos.

Gombos reported as instructed where he met Eicher in the early morning. After exchanging introductions, Eicher told him that his roommate at the hotel would be Plumbing Foreman Scott Winters, and that Winters had a company credit card and would take care of him. Eicher then took him to an area where there was a large amount of duct material. He told Gombos to begin installation and gave him a phone number to call for any needed equipment or supplies, with an assurance that his requests would be taken care of right away. Promptly thereafter Eicher left him alone and returned to his offsite office. Gombos proceeded to assemble the ductwork below lines where it was to be hung.

When the lunchbreak began at 12:30 p.m., Gombos first went to his car where he donned a T-shirt and cap bearing the union logo and then went to an area where three other employ-

ees, including Foreman Winters were eating. Introducing himself as a union organizer, he then addressed their concerns about wages and benefits, including independent contractor status. Winters interrupted saying: "You know I have to advise the company that you're here." Gombos replied: "Do what you have got to do, just do me a favor, walk don't run, because you're not covered under Workers Comp and I don't want to see you fall and get hurt because it won't be paid for." Everyone chuckled, and Winters left. Gombos continued his presentation and at the end of the break he and the others went back to work.

About 20 minutes later, Eicher arrived at the site, went directly to where Gombos was working, and ordered him off the site immediately. Gombos asked: "Why," and Eicher replied: "You didn't fill out any paperwork . . . tan application, a resume, a W-2 . . . you're not an employee." When Gombos asked for an opportunity to do so and volunteered to complete it on the spot, Eicher gave him another reason for ordering him off the site, stating: "There's no foreman here [and] you can't be working out here without a foreman." Gombos made a further inquiry. He asked if he was being discharged because of his union activity during lunchtime. Eicher answered: "I don't know what you're talking about. . . . that don't have nothing to do with it." Gombos had a final question. He asked: "Who's telling you to run me off?" Eicher replied: "Well Gerald [Miller—said you didn't have your paperwork . . . and [had] to go." At that point, Gombos gathered his things and left the site.

While Miller concedes that on August 28 he agreed to pay Gombos \$7 an hour, gave him Eicher's name and directions to the Hampton Inn construction site, he denies ever hiring him stating that he merely made a job offer contingent on receipt of a resume from which he could check references. Also, he claims he made no arrangement for Gombos' housing or expenses because sheet metal installation at the site was not to begin for "a week or two" and no foreman had been designated.

As to events on August 29, Miller claims that "sometime" in the morning he was advised that "someone" had called his office in Covington (Ohio) stating that the Hampton Inn job had shut down, and that he telephoned Eicher and told him to go to the site and investigate.⁷ Continuing, he states that Eicher called back later in the day and reported there had been no shutdown, that a job applicant named "Gombos . . . [who] 'wasn't hired in' . . . just had a meeting, at break[time]" and that he had sent Gombos home because he didn't have any paperwork.⁸

Eicher claims he had no prior knowledge that Gombos would come to the Hampton Inn site on August 29. Assertedly, he put Gombos to work relying on Gombos' statement that Miller had hired him. In addition, he assumed that Miller in sending Gombos intended sheet metal work to being immediately and would send a foreman for that work within 3 hours. He denies making any hotel arrangements for Gombos.

Testifying further, Eicher states that about 10:30 a.m., and after he returned to his office in Columbus, Miller called and

⁶ *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 at 174 (1973); *Martin Luther King Sr. Nursing Center*, 231 NLRB 15 at fn. 1 (1977).

⁷ Asked by his counsel if Eicher had mentioned Gombos in the call, President Miller replied: "I don't think he did. I'm not positive." On cross-examination, however, in the course of a rambling answer he volunteered that "Bill [Eicher] knew, *from me* [emphasis added], that—you know, that he [Gombos] was never supposed to go out there that morning and work and everything." I infer that he suddenly recalled having discussed Gombos during the call.

⁸ Miller appears studiously to avoid use of the word "union" in recounting what Eicher said about Gombos' lunchtime "meeting."

told him to go to the site and find out whether the Hampton Inn job had shut down. Assertedly he used the occasion to inquire of Miller: "By the way Gerald, [I assume] you're going to start the sheet metal today? . . . [because] you sent a sheet metal man . . . Gombos . . . [who I] started this morning." Also, he claims Miller denied having hired Gombos, that he (Eicher) went to the construction site, arrived about noon and ordered Gombos to leave telling him "you're not an employee . . . and no sheet metal foreman has been assigned to the job." Eicher returned to his downtown office, in time to answer a phone call in which he told Miller there had been no shutdown and that Gombos was gone with instructions to send (Miller) a resume. He claims no knowledge of Gombos' speaking about the Union at lunchtime.

I am singularly unimpressed by the Respondent's testimony. Miller was unable credibly to answer why he had given sheet metal worker Gombos written directions to the Hampton Inn jobsite if, as he claims, he had merely interviewed Gombos; and the significance of his assertion that a "resume" was a necessary prerequisite to hiring is belied by Foreman Eicher's disinclination to allow Gombos to provide background information on site. Also, I find wholly unbelievable Eicher's denial of any knowledge of Gombos' union activity prior to ordering him off the site.

On the other hand, Gombos appeared to be a candid witness and his testimony includes an abundance of truth enhancing detail and remained internally consistent after cross-examination. I conclude that Gombos was hired by Miller and then ordered discharged by him because he engaged in protected union activity during the lunchbreak; and that the Respondent's stated reasons for the discharge are pretextual.

CONCLUSION OF LAW

The Respondent violated Section 8(a)(1) and (3) of the Act in the particulars and for the reasons stated above; and its violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged employees, the Respondent must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, G. M. Mechanical, Incorporated, Covington, Ohio, its officers, agents, successors, and assigns, shall

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Coercively informing employees that they were discharged for protesting perceived unfair terms and conditions of employment by picketing.

(b) Discharging employees for supporting Sheet Metal Workers' International Association, Local 33, AFL-CIO or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer David E. Mains, Terry Brian Matthews, and Randy Gombos full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at all of its jobsites and offices in Ohio copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively tell you that you will be or are discharged for protesting perceived unfair terms and conditions of employment by picketing.

WE WILL NOT discharge or otherwise discipline you for supporting Sheet Metal Workers' International Association, Local 33, AFL-CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you for exercising rights guaranteed you by Section 7 of the Act.

WE WILL offer David E. Mains, Terry Brian Matthews, and Randy Gombos full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them.

WE WILL notify them in writing that we have removed from our files any reference to their unlawful discharges and that the discharges will not be used against them in any way.

G. M. MECHANICAL